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Nos. 07-1059 & 07-1078

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Supreme Court of the United States

UNITED STATES OF AMERICA, *Petitioner*,
v.
EURODIF S.A., *ET AL.*, *Respondents*.

USEC INC. AND UNITED STATES ENRICHMENT CORPORATION, *Petitioners*,
v.
EURODIF S.A., *ET AL.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONERS USEC INC. AND UNITED STATES ENRICHMENT CORPORATION

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RULE 29.6 STATEMENT

The corporate disclosure statement contained in USEC's Petition for Writ of Certiorari, Pet. ii, remains accurate.

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REPLY BRIEF FOR PETITIONERS USEC INC. AND UNITED STATES ENRICHMENT CORPORATION

In their briefs, respondents work at length to establish a point that we do not contest: that it is possible to view SWU transactions as sales of a service, as opposed to sales of the produced merchandise, low enriched uranium (LEU). But that point does not make respondents' case. Under the principles set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it is not enough for

respondents to show that the Commerce Department *could* view such transactions as sales of a service; rather they have to establish that the agency *must* view them that way, *i.e.*, that Commerce's treatment of SWU transactions as sales of merchandise is foreclosed by the statutory language or otherwise outside the bounds of reasonableness. *See Barnhart v. Walton*, 535 U.S. 212, 218 (2002). Judged by that exacting standard, respondents' case falls well short.

To begin with, it is telling that respondents do not refute any of the critical factors relied upon by Commerce to conclude that the enricher's delivery of LEU under SWU contracts can, and should, be considered a sale of LEU. Despite their invocation of "deeming" clauses and legal "fictions" in the SWU contracts, respondents necessarily acknowledge that the LEU delivered to a customer by an enricher is not made from the specific batch of raw material provided by that customer, but is made from a fungible inventory of unenriched uranium. Respondents also concede that the enricher transforms that fungible material into an entirely new article of commerce—LEU. And respondents accept that, regardless of how much unenriched uranium the customer provides, the enricher may produce LEU using as much unenriched uranium as it deems desirable, and may deliver *any* LEU that it produces to *any* customer. Based upon these undisputed facts, Commerce determined that, for purposes of the antidumping law, the enricher can reasonably be regarded as having ownership of the LEU that it produces and, consequently, that the transfer of a particular quantity of LEU to a utility pursuant to the agreed-upon terms amounts to a sale of the LEU.

Respondents insist, however, that the Commerce Department cannot decide that the enricher owns the LEU it produces and delivers in light of two provisions of the SWU contracts, which say that the utility retains title to the unenriched uranium it provides to the enricher and that the LEU delivered by the enricher to the utility is "deemed" to be made from that unenriched uranium. Relying on those contract provisions, they contend that the utility continuously owns both the unenriched uranium after it is delivered to the enricher and the LEU that is ultimately delivered by the enricher. But, even leaving aside that "title" and "ownership" are not necessarily the same thing, there are several flaws in their argument. First of all, as a factual matter, the supposed continuous chain of ownership by the utility simply does not exist: the LEU that the utility ultimately receives is not produced from the batch of uranium delivered by the utility. Moreover, as a legal matter, respondents do not cite any authority—none at all—for the proposition that a federal agency, in applying federal law to a particular transaction, is obligated to accept all of the provisions of the parties' contracts, particularly those that are at odds with the reality of the transaction. This Court has said just the opposite. *See, e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("form should be disregarded for substance and the emphasis should be on economic reality").

Respondents also argue that SWU transactions cannot be regarded as sales of merchandise because Commerce, in calculating the dumping margin in this case, valued only the SWU component of LEU. But respondents' characterization of what Commerce did erroneously mixes together what Commerce valued with

how Commerce valued it. As even respondents acknowledge, when Commerce compared U.S. prices and constructed value, the agency did not value just the enrichment component alone, but rather calculated values for LEU as a whole, using Eurodif's actual uranium sales prices as the basis for valuing the uranium component. Respondents' real complaint is thus about the methodology of that comparison—in particular, that Commerce used the same figure for the uranium component in arriving at the U.S. price and the constructed value—an objection that goes to a calculation issue not before the Court. And, in any event, it is well recognized that, where dumping margin determinations are concerned, the Department's methodologies are entitled to great deference. *See Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1380-81 (Fed. Cir. 2001).

Finally, respondents rely heavily on various decisions, including some by Commerce, that have treated certain transactions in which customers supply raw materials to foreign manufacturers as involving sales of services by the manufacturers. But those decisions at most demonstrate only that such transactions can be viewed as sales of services, not that they must be. Indeed, the most pertinent court of appeals' decision, *Florida Power & Light Co. v. United States*, 307 F.3d 1364, 1373 (Fed. Cir. 2002), makes clear that SWU transactions "do[ ] not fall neatly" into either category (sales of services or sales of goods), a conclusion that highlights just the sort of ambiguity that a federal agency is entitled to resolve when interpreting and applying a statute it administers. As for decisions by Commerce itself, Commerce has explained that, to the

extent that those cases suggest that it did not regard so-called tolling transactions as sales of subject merchandise, any such suggestion was an inadvertent by-product of the agency's focus on a very different determination—that subsequent sales by the customer should be used for purposes of calculating antidumping margins. This Court has recognized that an agency is not bound by its prior views on an issue, *see, e.g.*, *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981-82 (2005), provided that it gives a reasonable explanation for any change, and Commerce has explained why it did not fully appreciate the possible implications of its earlier view in other contexts and why its current view is based on a reasonable assessment of the actual nature of LEU transactions. As a result, its interpretation merits *Chevron* deference.

I. THE ANTIDUMPING LAW HAS NOT UNAMBIGUOUSLY FORECLOSED THE COMMERCE DEPARTMENT'S INTERPRETATION IN THIS CASE.

Under *Chevron*, the first question is whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843. If it has not, then any reasonable agency application of the statute must be upheld. Here, the "precise question" is whether transactions with the pertinent characteristics of SWU transactions can be regarded as sales of merchandise under the antidumping law. The Commerce Department concluded that SWU transactions could be viewed that way because, among other things, the enricher makes an entirely new product from fungible inventories of raw material, has full operational control over the making

of the new product, and can deliver any LEU it produces to anyone that it chooses. USEC Pet. 217a-221a. Given that degree of control over the ultimate product that is imported into the United States, Commerce determined that the enricher effectively owns the LEU until it delivers it to a particular utility customer and, thus, sells the product when it transfers ownership to that utility for consideration. *Id.* 222a.

Respondents contend that Congress has unambiguously foreclosed that interpretation, basing their argument on the position that the term "sale" (or, more specifically, "sold") requires a "transfer of ownership" for consideration. Eurodif Br. 17; AHUG Br. 19. But this argument, taken at face value, is close to a *non sequitur*. In its Final Remand Determination, the Department not only explicitly quoted that same definition of a "sale," USEC Pet. 220a, but then went on to find a sale here precisely *because* it determined that there was a transfer of ownership in LEU for consideration. *Id.* Thus, a transfer-of-ownership requirement, by itself, cannot possibly be the basis for rejecting the Department's decision under the first step of *Chevron*.

To have any possible force, therefore, respondents' statutory argument would have to be at one stage removed: that the word "ownership"—read into the statute by implication—has an unambiguous meaning that bars Commerce from treating enrichers as owners of the LEU they transfer. But, on that more specific point, respondents face serious obstacles. To begin with, they offer no definition of "ownership" at all, let alone an unmistakably clear one. Furthermore, it is hard to

imagine that any universally-applied definition of "ownership" could be found. As Justice Breyer has observed: "[T]he words 'own' and 'ownership' . . . are not technical terms of art but common terms, the precise legal meaning of which depends upon the statutory context in which they appear." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 481 (2003) (Breyer, J., concurring in part and dissenting in part).[1] Similarly, the Second Circuit has stated, referring to the definition of "owner" in an earlier edition of *Black's Law Dictionary*, that "[t]his definition's ambiguity comes as no surprise. Long-standing scholarship has informed us that ownership—and its attendant concept 'property'—has limited inherent content." *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (*citing Black's Law Dictionary* 1130 (7th ed. 1999)).

Reflecting that lack of concreteness, dictionary definitions of owner and ownership have tended to vary over time and according to circumstances. The most recent edition of *Black's Law Dictionary*, however, defines the term "owner" in largely functional terms as "[o]ne who has the right to possess, use, and convey something; a person in whom one or more interests are vested." *Black's Law Dictionary* 1137 (8th ed. 2004). Indeed, in this current definition, the authors have attempted to eliminate at least part of the "ambiguity" noted by the Second Circuit in *Commander Oil*, choosing to delete the previous alternative definition of

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[1] In *Dole Food*, the Court looked at the statutory context and held that Congress, in using the term "ownership" in the Foreign Sovereign Immunities Act of 1976, had intended for it to be interpreted in light of corporate law principles, rather than "in the colloquial sense of that term." 538 U.S. at 474.

an owner as "[o]ne who has the primary or residuary title to property. . . ." *See Black's Law Dictionary* 1130 (7th ed. 1999). As a result, any determination of who has "ownership" of particular property—at least when title and possession lie in different persons—requires a fact-based inquiry into the parties' respective rights to use and control the property. *See, e.g., United States v. Peterson Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1358-59 (N.D. Ill. 1992) (concluding that a trustee holding legal and beneficial title, but not having management and control of the property, was merely a "paper owner" and, for purposes of CERCLA liability, did not hold "ownership under the[] pragmatic federal standards" recognized by this Court in *Frank Lyon Co. v. United States*, 435 U.S. 561 (1978)). There is no reason to think that Congress, merely by using the word "sold," meant to preclude Commerce from undertaking that more "pragmatic" examination of ownership in cases subject to the antidumping law.

That possibility becomes even more improbable if one considers the 1984 amendment to the antidumping law. *See* USEC Br. 32-33, 52. In that amendment, Congress provided that "a reference to the sale of foreign merchandise includes the entering into of any leasing arrangement regarding the merchandise that is *equivalent to* the sale of the merchandise." 19 U.S.C. § 1673 (2000) (emphasis added). The Committee Report explained the reason for the amendment by noting that "leasing arrangements are often utilized to accomplish what are in effect transfers of ownership." H.R. Rep. No. 98-725, at 11 (1984). Taking the language of the statute and the Committee Report together, therefore, it seems apparent that Congress did not intend the

concepts of "sale" or "transfer of ownership" to have the narrowest possible meaning. And, while it is certainly correct that the amendment, by its terms, applies only to leases, the underlying principle reflected in the amendment—that the parties' contractual arrangements do not necessarily control whether a transfer of ownership has taken place—is relevant to other kinds of complex transactions under the antidumping law.

It is thus evident that Congress has not forbidden the agency determination here, even if the controlling definition of "sale" is a transfer of ownership for consideration. That said, we have previously cited to several cases from this Court that take a broader view of the term "sale," one of which expressly noted that "[a] regulatory statute . . . would be hamstrung if it were tied down to technical concepts of local law." *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 400 (1965). *See* USEC Br. 23, 31. While respondents try to distinguish these cases, they do so primarily by asserting that the facts show "an effective transfer of ownership" (Eurodif Br. 24) or "a transfer of some ownership rights" (AHUG Br. 28). Those purported explanations may simply confirm that the concept of "ownership" is itself open to ambiguity—the point that we have just made—but they also tend to suggest that the term "sale" leaves room for agency interpretation in light of the statutory purposes. Either way, however, Congress has not conclusively spoken to the precise question here, thus delegating to Commerce the authority to provide a reasonable interpretation and application of the term.

II. COMMERCE REASONABLY CONCLUDED THAT SWU TRANSACTIONS INVOLVE A TRANSFER OF OWNERSHIP OF LEU FOR CONSIDERATION.

A. Commerce Reasonably Found That Enrichers Transfer Ownership Of The LEU.

1. The second question under *Chevron* is whether the agency's interpretation of the statute is reasonable. *See United States v. Mead*, 533 U.S. 218, 229 (2001). With respect to this question, respondents make no headway in challenging the factors on which Commerce relied for its determination that SWU transactions involve transfers of ownership and, thus, sales of merchandise. For example, they do not dispute that an enricher, by substantially transforming raw material into LEU, creates—and then transfers—a new article of merchandise. But that concession necessarily undermines respondents' characterization, pressed throughout their briefs, that the enricher is merely processing and returning the same good that the utility originally provided.

Respondents likewise cannot directly contest the fact that the enricher does not make LEU for a particular utility from the specific raw material provided by that utility. Although respondents repeatedly refer to the LEU delivered to a particular customer as though it were in fact produced from "the" uranium delivered and owned by the customer,[2] they ultimately are forced

[2] *See, e.g.*, Eurodif Br. 9 ("the utilities will retain title to *the* uranium feed throughout the enrichment process"); *id.* 19 ("utilities provide Eurodif with *the* feed they want enriched. . . ."); AHUG Br. 6 ("Next, the utility separately contacts with an (Cont'd)

to explain that this assertion rests on a contractual provision "deeming" that to be the fact. *See* Eurodif Br. 37, citing C.J.A. 17, 87, 140, 188, 268 ("deeming" provisions of SWU contracts); AHUG Br. 22 (same). But, for present purposes, the difference between the contract and the real world is significant. That "deeming" provision (and other provisions of the contract) may well control the rights of the contracting parties *vis a vis* each other, *see* USEC Br. 53, but it is hardly unreasonable for Commerce, in determining whether the antidumping law applies, to give greater weight to what actually happens than to what the parties "deem" to happen in agreements between themselves. *See infra* pp. 13-15.

That is precisely what Commerce did here. As the agency pointed out, the actual production and delivery of LEU bears little resemblance to the fiction embedded in the SWU contracts between Eurodif and its utility customers. USEC Pet. 219a. Rather, in producing LEU, Eurodif gasifies unenriched uranium from its fungible inventory of unenriched uranium, which includes uranium that it unquestionably owns (USEC Pet. 221a), and continuously recycles that gas to make LEU—any of which can be delivered to any customer. (LEU at any particular product assay is itself fungible.) Thus, as Commerce found, the utility has no right of ownership in the LEU until delivery, and the enricher has "the

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(Cont'd)

enrichment service provider to enrich *the* UF_6"); AHUG Br. 7 ("The utility retains ownership of *the* uranium in all of its chemical forms throughout these stages of nuclear fuel production . . . .") (emphasis supplied in all quotations).

right to sell the LEU at issue to any buyer" until that time. *Id.* 219a. Furthermore, Eurodif, like any enricher, produces that LEU using whatever proportions of raw material and power it deems most advantageous. It has no obligation to use the identical amount of raw material provided by a utility pursuant to any specific purchase order, and, indeed, the enricher almost invariably "overfeeds" (uses more uranium) or "underfeeds" (uses less uranium) in order to produce LEU at the least possible cost. *See* USEC Br. 9-11; USEC Pet. 229a-230a.[3]

It is thus clear that an enricher exercises total control over the production and disposition of all LEU that it produces. Certainly, a utility, in submitting its purchase orders, has a range of choices about how much cash and unenriched uranium it will provide. USEC Pet. 229a. But all that means is that the utility has some control over the terms of the *transaction*, not that it has any control over the *production* of LEU. And while respondents point out that the utilities decide how much LEU to order and what the U_{235} concentration (assay) of that LEU should be, the fact that the customer can make that kind of choice—which is no different from the choice any purchaser of goods can make—hardly shows that the enricher lacks ownership of the LEU that it produces. Notably, the utilities make the same decisions about amount and concentration of LEU in

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[3] Indeed, as we have previously noted, USEC Br. 49, and respondents do not dispute, the enricher may pre-produce LEU that is ultimately delivered to a customer even before the customer provides any unenriched uranium. Or an enricher may fulfill its obligations under a SWU contract, without making any LEU at all, by arranging for the delivery of LEU produced by another enricher. *Id.* 10-11.

cash-only (EUP) transactions, and respondents concede that those transactions involve a sale of merchandise by the enricher. *See* USEC Br. 8-9 (describing SWU and EUP transactions).

Taking all these factors together, it was entirely reasonable for the Department to decide what it did: that, prior to the customer's obtaining delivery of the LEU it ordered, the enricher has sufficient rights in, and control over, the LEU it produces to be regarded as the owner of that LEU. It is true, of course, that the enricher would be subject to a breach of contract claim if it failed to deliver the requisite amount of LEU to the utility, but that potential liability is not inconsistent with the determination that the enricher owns the LEU it produces. The fact that a customer has a contractual right to the future delivery of a specified amount of goods is very different from having ownership of those goods before they are delivered.

2. Respondents' principal argument is that the factors relied upon by Commerce cannot demonstrate the enricher's ownership of LEU because SWU contracts provide that the utility retains "title" to the unenriched uranium it supplies to the enricher and that the delivered LEU is "deemed" to have been produced from that uranium. Taken together, those two provisions lie at the heart of respondent's position that the utility owns the LEU before it is delivered. But this argument depends upon a false factual premise. While the utility may continue to hold title to a designated amount of unenriched uranium, it cannot claim (other than by resort to deeming) that it has title to, or ownership of, the *actual* feedstock used to make the LEU that it ultimately receives.

Respondents plainly believe that the Commerce Department must accept what the parties have deemed as fact, but they offer no authority at all to support that implausible proposition. Not surprisingly, the law is firmly to the contrary. This Court has frequently held that administrative agencies, in applying federal regulatory statutes to particular transactions, are not constrained by the parties' contractual arrangements. *See, e.g., California Lo-Vaca Gathering Co.*, 379 U.S. 366, 369 (1965) ("Were [the parties] free to allocate by contract gas from a particular source to a particular use, havoc would be raised with the federal regulatory scheme. . . ."); *Tcherepnin v. Knight*, 389 U.S. 332; *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); *Corliss v. Bowers*, 281 U.S. 376 (1930). And, despite respondents' attempts to suggest otherwise, that is so regardless of whether those arrangements reflect an intent to evade the particular federal law. *See United Gas Improvement*, 381 U.S. at 400 (court looks beyond structure of transactions "[w]ithout impugning in any way the good faith and genuineness" of those transactions).

The Department thus was not required to accept, contrary to fact, that the LEU delivered to a utility is produced from its own feedstock. But, once the fiction of "deeming" is set aside, the other contractual provision relied on by respondents—the title retention provision—essentially becomes irrelevant to the issue here. A utility cannot credibly claim ownership of any particular LEU upon production (and before delivery) merely because it has retained "title" to an undifferentiated quantity of feedstock in the enricher's

inventory.[4] Indeed, even if one were to indulge the assumption that the LEU delivered to a utility *is* made from its feedstock, it would hardly be self-evident that the utility automatically owned that LEU—a different article of merchandise—prior to delivery. A number of the SWU contracts, in fact, suggest just the opposite, specifically providing that the enricher must transfer title to the LEU, and give warranties regarding that title, to the utility, *see, e.g.*, C.J.A. 23, 147, an obligation that necessarily implies that the enricher has ownership in the first place.

B. Respondents' Arguments About Price And Valuation Are Incorrect.

Respondents make two loosely connected arguments about the "price" of LEU, apparently to demonstrate that SWU transactions cannot be treated as sales of merchandise. To start with, they argue that the contracts between Eurodif and its customers reflect only a sale of services because "[t]he contracts do not contain any price term covering uranium. . . ." Eurodif Br. 37. But, under any natural meaning of the words "price term," that is not the case. The SWU contracts (taken together with the relevant purchase orders) provide that, to obtain LEU, a customer must provide *both* a stated amount of cash *and* a specified amount of unenriched uranium for the enricher's feedstock. Those

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[4] Even with respect to the unenriched uranium itself, we have already pointed out that a person holding title to property does not always own the property when another person has rights to possess and use it. USEC Br. 50-53. By contrast, respondents cite nothing to support the notion that ownership of property is invariably determined by the locus of title alone.

requirements are inextricably linked: if the customer wishes to purchase LEU with a lower cash payment, then it must compensate by supplying more uranium, and *vice-versa*. As a result, both the amount of cash and the amount of unenriched uranium are necessary "price terms" for the acquisition of LEU under a SWU contract.[5]

Respondents make a similar error with regard to the calculation methodology used by Commerce to determine that dumping had occurred in this case, arguing that Commerce in effect valued only the SWU component, not LEU itself. But, as even respondents grudgingly acknowledge, Eurodif Br. 48; AHUG Br. 42, Commerce established values and prices for LEU, the subject merchandise, *in its entirety*, taking actual prices for the SWU component and adding a reasonable estimated value for the unenriched uranium component. Accordingly, because Commerce valued the whole article of imported merchandise (the LEU), any statutory requirement that the dumping margin be based on the full value of the imported merchandise—or any alleged jurisdictional prerequisite for the transaction to be deemed a sale of merchandise in the first place—has been satisfied. Whether Commerce correctly calculated the dumping margin is a separate question that is not before the Court.

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[5] Respondents claim that Commerce rejected the notion that the feedstock could be consideration. *See, e.g.*, Eurodif Br. 43 n.21. But Commerce plainly treated the feedstock as payment in kind—observing only that it might not be regarded that way "in the formal sense" (USEC Pet. 80a)—and it concluded that the arrangement is "dedicated to the delivery of the LEU...." *Id.* As a consequence, it sought to determine the value of what was exchanged for the LEU, not just for the SWU. *See id.* 216a-217a.

In any event, there is nothing suspect about Commerce's decision to use estimated values for the unenriched uranium component. Although AHUG dismissively refers to the estimates as the "fictitious input value," AHUG Br. 43, the values Commerce used were reasonable,[6] and its use of an estimate was consistent with the statute and its past practice. USEC Pet. 245a. Indeed, it would be difficult for Commerce to carry out the purposes of the statute without doing so. The courts have long recognized that Commerce has broad latitude in addressing the myriad complexities of dumping calculations. *See, e.g., Am. Silicon Techs*, 261 F.3d at 380-81 ("This court 'accords deference to the determinations of the agency that turn on complex economic and accounting inquiries'") (quoting *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996)).

It was also reasonable for Commerce to have assigned the same value to the unenriched uranium on both sides of the antidumping calculation—that is, for purposes of making a "fair comparison" (19 U.S.C. § 1677(a)) between the U.S. price at which LEU was sold and the constructed value of that merchandise. The appropriate valuation of an input is ultimately a question of fact, and respondents have not made any showing that different values would have been appropriate, much less required. And, while it is certainly true that the use of identical values for natural uranium on both sides of the equation isolated the pricing difference for the SWU component, the reason is obvious: Eurodif

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[6] Commerce valued the unenriched uranium delivered by utility customers on the basis of the prices that Eurodif charged its EUP customers for unenriched uranium during the period of investigation. USEC Pet. 83a-84a.

engaged in discrimination with respect to that component. The ultimate effect of that discrimination, in turn, was that Eurodif was selling LEU to consumers in the United States at prices below the constructed value of that merchandise, just what the antidumping law was intended to address.

III. CASE LAW UNDER OTHER STATUTES AND COMMERCE'S TOLLING PRECEDENT ARE NOT CONTROLLING HERE.

A. The Case Law Does Not Foreclose Commerce's Interpretation.

Although respondents and their *amici* rely on a wide variety of case law, only three cases—those finding that SWU transactions should be regarded as sales of services under other statutes—are particularly relevant. *See* Eurodif Br. 44-45. But none of those cases involved judicial review of an agency's interpretation of a statute that it was responsible for administering. As we have pointed out, *see supra* pp. 1-2, the critical question under *Chevron* is not whether a federal court could view SWU transactions as sales of services, but whether a federal agency acts unreasonably in treating them as sales of merchandise. The cited cases had no reason to, and thus did not, address the latter question.

Furthermore, the analysis in the *Florida Power & Light* case largely contradicts respondents' argument that SWU transactions are unquestionably sales of services. In contrast to the perfunctory analysis in *Barseback* and *Centerior*, Eurodif Br. 44-45, AHUG Br. 40 n.28, the Federal Circuit in *Florida Power & Light* engaged in a careful examination of whether SWU

transactions involved the "disposal of personal property" and concluded that it was a close question. Thus, the court of appeals compared SWU transactions, on the one hand, to a category of transactions in which the enricher made LEU without any contribution of uranium by the customer and, on the other hand, to transactions (albeit theoretical) in which the enricher made LEU from the very uranium supplied by the customer, ultimately acknowledging that SWU transactions "do[ ] not fall neatly into either of the above categories," 307 F.3d at 1373. But, where it is difficult to tell whether particular transactions fall within the terms of a federal statute, the teaching of *Chevron* is that the agency charged with administering the statute should have broad latitude to make the necessary determination.

The remaining cases cited by respondents and their *amici* have little or nothing to say about whether Commerce could reasonably regard SWU transactions as sales of merchandise. For example, many of the cited cases simply recite that the word "sale" should be given its ordinary meaning. *See* Alcoa Br. 16-19. But Commerce explicitly found that Eurodif transfers ownership of LEU for consideration, thereby satisfying the common definition of a sale. As a result, unless the cited cases employed some particularly narrow construction of the term "ownership"—and none of them does—they do not help respondents on the central issue here.

The final group of cited cases makes a different point: that the Robinson-Patman Act and similar statutes regulating sales of goods do not apply to sales of services. *See* Eurodif Br. 30; Alcoa Br. 17. But no one

contests that point. The Commerce Department did not decide that the antidumping law covers sales of services, but rather that SWU transactions were sales of merchandise. And respondents can hardly rely on these cases to show that it is a simple matter to distinguish between sales of goods and sales of services—and thus that Commerce was plainly out of bounds in finding a sale of goods here—because one of the cited Robinson-Patman Act cases says just the opposite. *See First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989). There, the Seventh Circuit expressly noted that "[b]ecause of the functional overlap, the distinction between goods and services is not always clear. Many transactions are of a hybrid nature contemplating both goods and services . . . ." *Id.* at 1035. To say the least, that observation is more consistent with the existence of ambiguity than with the lack of it.[7]

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[7] Although the federal courts apply a "dominant nature" test under the Robinson-Patman Act to determine whether a transaction involves a sale of goods, *see, e.g., Aviation Specialties Inc. v. United Techs. Corp.*, 568 F.2d 1186 (5th Cir. 1978) (looking to dominant nature of contract), respondents have not urged application of that test here. Moreover, even if they had, it would be entirely reasonable for Commerce to conclude that the dominant nature of a SWU transaction is the acquisition of LEU, with the customer providing uranium and cash in order to obtain it. *See* USEC Pet. 80a (Commerce conclusion that a SWU contract is "dedicated to the delivery of LEU").

B. Commerce May Reconsider The Issues In Its Tolling Precedent.

Respondents also rely on past administrative decisions by the Commerce Department applying the antidumping law in the context of so-called toller-tollee transactions. But, even if those prior decisions stand for the proposition that such transactions generally do not involve a sale of merchandise by the toller (manufacturer)—something that Commerce explicitly said (in dicta) in only one of the cited decisions (Response to Court Remand, *Taiwan Semiconductor Mfg. Co. v. United States*, No. 98-05-02184, slip op. 00-48 (June 2, 2000))—that viewpoint still would not prevent the agency from adopting a modified, even inconsistent, position now. That is particularly the case where Commerce has found, after more exhaustive analysis than in any of its past cases, that SWU transactions involve a transfer of ownership of the subject merchandise. Just as an agency may choose between various positions in the first place, it can change from one position to another as it develops additional understanding of the problems to be addressed.[8]

This Court has made that principle clear on numerous occasions. In *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005), for

[8] The tolling regulation, 19 C.F.R. § 351.401(h) (2008), by its terms only applied "where the toller or subcontractor does not acquire ownership, and does not control the relevant sale of the subject merchandise." Accordingly, Commerce's conclusion that enrichers make a sale of merchandise when they deliver goods that they own to their customers is consistent with the tolling regulation, which has since been revoked but was in effect during the proceedings below.

example, the Court noted that "[a]n initial agency interpretation is not instantly carved in stone. On the contrary, the agency . . . must consider varying interpretations and the wisdom of its policy on a continuing basis . . . ." *Id.* at 981 (internal quotation marks omitted) (ellipsis in original). Indeed, the rule could hardly be otherwise if an agency is to have the flexibility to learn from experience. Thus, "[a]n agency is not required to establish rules of conduct to last forever, but rather must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances." *Rust v. Sullivan*, 500 U.S. 173, 186 (1991) (internal citations and quotation marks omitted) (alteration in original).

Contrary to respondents' argument, an agency's decision to change its position on a question of interpretation does not mean that its later view gets only limited deference. Although the Court has sometimes said that an inconsistent agency viewpoint is entitled to less weight, *see* Eurodif Br. 33 (citing *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993)), more recent cases from this Court have not followed that path. As the Court pointed out in *Brand X*, "[a]gency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework." 545 U.S. at 981. To the contrary, "if the agency adequately explains the reasons for a reversal of policy, change is not invalidated since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Id.* (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996)).

To be sure, as the above cases make clear, an agency must give a proper explanation for its adoption of a modified view. But Commerce has given an extensive explanation in this case, especially in its 2003 Final Remand Determination. *See* USEC Pet. 203a-231a; *see also* 241a ("the Department is authorized to depart from its prior practice as long as the agency articulates a reasoned analysis"). Most particularly, it has pointed out that its previous view was developed in the quite different context of determining whether *subsequent* sales of toll-produced merchandise by the customer should be considered the relevant sale for purposes of calculating antidumping margins. *Id.* 205a-208a. Commerce also explained that, in focusing on later sales by the customer, it did not consider the possible implications of its view in the present context (where the customer makes no further sale). *Id.* 205a. And, in its initial decision, it recognized that, if it were to treat toller-tollee transactions as merely sales of services—even where a transfer of ownership in the subject merchandise has taken place—it would be putting certain transactions in merchandise "squarely outside the realm of trade in goods, based solely on the way in which particular sales of such merchandise were structured." USEC Pet. 194a (quoting *Final French AD Determination*, 66 Fed. Reg. 65,877, 65,879 (Dec. 21, 2001)).

It would be particularly inappropriate to prevent Commerce from addressing that incongruity here. Although respondents do not mention it, the administrative history shows that, in the period immediately prior to the 1990s, Commerce treated toller-tollee transactions as sales of merchandise, not

as sales of services, and it calculated antidumping margins based on those sales. *See, e.g., Certain Small Diameter Welded Carbon Steel Pipes from the Philippines*, 51 Fed. Reg. 33,099 (Dep't Commerce Sept. 18, 1986) (final det.); *Brass Sheet and Strip from Canada*, 51 Fed. Reg. 44,319 (Dep't Commerce Dec. 9, 1986) (final det.); *Certain Television Receivers, Except for Video Monitors, from Taiwan*, 55 Fed. Reg. 47,093 (Dep't Commerce Nov. 9, 1990) (final det. admin review). When it departed from that approach in the 1990s in order to focus on the subsequent sale by the customer, it did so in order to eliminate what it saw as an unjustified difference in treatment between businesses that made goods themselves and then sold them, and businesses that obtained goods manufactured by subcontractors and then sold them. But, by shifting its attention to sales by the customer, Commerce inadvertently wound up creating another unjustified distinction—between sales of merchandise for cash and sales for a combination of cash and raw materials—that it is now seeking to correct. Under respondents' theory, however, Commerce would only have full latitude to make the first change, not the second, thereby denying deference to the agency for its more thoroughly considered position.

The reconsideration of how to treat transactions where customers provide raw material as well as cash to a manufacturer has also allowed Commerce to examine more carefully the respective roles of the manufacturer and its customers, and to focus its attention on two factors not specifically addressed in its prior decisions: the control by manufacturers over the production and disposal of the relevant goods and their

use of fungible inventories of raw material. The first factor reinforces the understanding that, in reality, the manufacturer possesses the essential attributes of ownership in the manufactured goods, while the second factor, at least in cases like this one, punctures any illusion that the buyer holds title to the raw material actually used in making the merchandise delivered to that buyer. Taken together, they strongly indicate that the manufacturer is making a sale of the produced merchandise, not just giving back the customer's own goods in modified form. While the agency presumably could have settled on that conclusion at an earlier time, it was not limited to just one look at the issue, and its current view should be upheld so long as it is reasonable and properly explained. That is the case here.

IV. COMMERCE'S DETERMINATION FULFILLS THE PURPOSES OF THE ANTIDUMPING LAW.

Respondents argue that the decision below does not create a serious loophole in the antidumping law because the law can just be applied to subsequent sales by the customer. Eurodif Br. 53; AHUG Br. 49. That answer is cold comfort when there is no later sale, of course, but respondents suggest that such instances are rare. In fact, many imported goods (such as equipment, printing presses, and other tools of production) are not resold at all, but are used by the purchasers to produce other goods. Under respondents' theory, if the foreign manufacturer arranges for a purchaser to provide the raw materials for such goods, the transfer of those goods by the manufacturer would be a sale of manufacturing services beyond the reach of the antidumping law.

Even leaving aside goods that are consumed by the buyer, respondents' efforts to downplay the potential loophole are unpersuasive. While Commerce might be able to impose duties on a subsequent sale of the identical good,[9] it is by no means certain that Commerce would be able to apply the antidumping law to the sale of a *different* good that merely incorporates the imported merchandise. As a result, foreign companies would have a potential exemption from antidumping duties for the sale of component parts so long as they structured their deals as sales for cash and raw materials, rather than for cash alone. For example, magnesium from China and Russia is currently subject to antidumping orders, which *amicus* Alcoa has opposed. (Alcoa is the "world's largest consumer of magnesium" in connection with its production of aluminum products.)[10] If the Federal Circuit decision is upheld, however, Alcoa might be able to obtain magnesium from China and Russia without regard to those orders simply by supplying foreign manufacturers with the raw material needed to make magnesium and then incorporating the foreign manufactured merchandise into Alcoa products.

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[9] In light of the Federal Circuit's broad declaration that "LEU produced as a result of [SWU] contracts is not subject to the antidumping law," USEC Pet. 19a, however, it is not clear that the Federal Circuit would conclude that Commerce has authority to apply the antidumping statute to transactions that take place after such excluded merchandise has been imported.

[10] *In the Matter of Magnesium From China and Russia*, Inv. Nos. 731-TA-1071 and 1072 (Final), Hr'g Tr. 153, 156 (Feb. 23, 2005), available at http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2004/magnesium/final/PDF/Hearing-open%2002-23-05.pdf (statement of Robert McHale, Vice President of Alcoa Materials Management).

With respect to LEU imports from Russia, Congress recently enacted emergency appropriations legislation that included a provision to ensure that the uncertainty created by the Federal Circuit's decision does not adversely impact continued imports of LEU down-blended from nuclear weapons.[11] The quotas on Russian LEU in the legislation are tied to completing the existing HEU agreement, and expressly cover all forms of Russian LEU imports, including imports under SWU transactions. While this legislation significantly reduces the threat to the domestic enrichment industry of dumped LEU from Russia, it does not at all affect the continued threat of dumping of LEU from France. The International Trade Commission has recently found that such imports would have a significant adverse impact on the domestic industry. *See* USEC Br. 56 n.16.

Lastly, respondents and their *amici* argue that the antidumping statute is a "narrowly focused statute" Alcoa Br. 6, that should not be broadened by this Court. AHUG Br. 19. But their contentions with respect to the law's narrow focus are based solely on their repeated statements that (1) the law applies only to sales of goods, not sales of services, and (2) a sale of goods requires a transfer of ownership of the subject merchandise. Eurodif Br. 22; AHUG Br. 18-19. No one disputes the first point, and the decision by Commerce in this case

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[11] 2009 Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, Pub. L. No. 110-329, § 8118, 122 Stat. 3574 (2008) (to be codified at 42 U.S.C. §§ 2297h *et seq.*). Section 8118 is entitled "Incentives for Additional Downblending of Highly Enriched Uranium by the Russian Federation."

fully meets the transfer of ownership standard contemplated by the second. And, if there is a question regarding how the antidumping law should be applied to protect U.S. manufacturers, Kazatomprom Br. 12, Congress put the Executive Branch, through the Commerce Department, in charge of striking that balance.

When all is said and done, respondents simply offer no good reason to believe that Congress meant to exempt import transactions of this kind from the antidumping law. As Commerce observed, and respondents do not refute, the importation of LEU pursuant to SWU contracts has precisely the same adverse effect on domestic industry as the importation of LEU pursuant to EUP contracts. Yet, under respondents' approach, the latter would be subject to the antidumping law while the former would not. Given that Congress unquestionably intended to protect domestic competitors from sales of foreign merchandise at less than fair value, it is hard to see why Congress would want coverage of the statute to depend entirely on how the private parties structured their transaction—whether the buyer gave the enricher all cash or a combination of cash and raw material—rather than on its essential character (the buyer's acquisition of LEU for consideration). Although respondents evidently think that federal agencies must treat contractual arrangements—even ones that depend on a "fiction"—as conclusive, Commerce acted within its discretion in rejecting that position and concluding that all LEU transactions fall within the scope of the antidumping statute. That ruling should be upheld.

CONCLUSION

The decision of the United States Court of Appeals for the Federal Circuit should be reversed.

Respectfully submitted,

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